Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, et al.,

Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I.

INTRODUCTION

The three issues presented in this case all meet this Court's criteria for review. The Endangered Species Act ("ESA") issues relating to consultation and mootness are of national significance and will arise again, and the mootness issue involves a conflict between four circuit court decisions issued in the past two years. The facial preemption issue is also of national significance. All three issues were wrongly decided. Furthermore, Respondents' Brief in Opposition ("Respondents' Brief"), response to this Court's order of March 3, 1999, offers no convincing reason why this Court should not review the issues presented by this case. Indeed, in a brief in support of Respondents' application for attorney's fees ("Attorney's Fees Brief," App. at 1-8) filed before the Ninth Circuit, they strenuously argue that all three issues have national significance. Specifically, Respondents contend that the law of the ESA relating to the scope of the consultation obligation and whether subsequent compliance moots a procedural violation of the consultation requirement is significantly impacted as a result of the Ninth Circuit's decision in this case. Respondents also stated that the decision on the facial preemption issue reaffirms a national precedent.

Despite agreeing with Petitioners that the Ninth Circuit's decision on these issues is of national significance and that they will arise in other cases, Respondents nevertheless argue that the Supreme Court should not grant certiorari in this case. However, Respondents' arguments in their Attorney's Fees Brief leave no doubt that all these issues are appropriate for review and highlight the reasons why this Court should grant the Petition for Writ of Certiorari.

II.

THERE IS A CONFLICT AMONG THE CIRCUITS ON MOOTNESS AND SUBSEQUENT COMPLIANCE WITH ESA REQUIREMENTS

Respondents argued to the Ninth Circuit that its mootness decision is of broad application and very significant:

> "This Court's decision aids interpretation and implementation of ESA in a number of ways. . . . As explained by Professor Dan Tarlock a nationwide authority on both western water law and the ESA, "[f]or the *first time* a court has held that the failure to respect mandated processes cannot be corrected by post hoc actions because post hoc actions preclude possible mitigation options." (Citation omitted.) This Court's affirmation of ESA procedure as essential to overall compliance with the statute *has application to a wide variety of government projects.*" (App. at 5-6; emphasis added.)

Professor Tarlock's statement emphasizes the uniqueness of the Ninth Circuit's decision and the conflict between the circuits on this issue. Respondents' attempt to argue to the contrary before this Court is unavailing and in direct contradiction of their Attorney's Fees Brief.[1]

Respondents argue that since the relief sought in the instant case was rescission, the Ninth Circuit's decision is consistent with the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724 (10th Cir. 1997) ("SUWA") and the Fifth Circuit's decision in *Sierra Club v. Glickman,* 156 F.3d 606 (5th Cir. 1998). This is

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[1] Respondents' argument that the mootness issue is not appropriate for review because there is a separate basis for the Ninth Circuit's decision is specious. Obviously, Petitioners contend that the Ninth Circuit also incorrectly decided the NMFS consultation and that both aspects of the decision are wrong.

incorrect. The issue in all three cases is whether subsequent procedural compliance with ESA requirements moots a claim of procedural violation. The *relief* sought in the cases is irrelevant. If subsequent procedural compliance moots a procedural violation there is no basis for relief, including rescission. Thus, Respondents' argument is merely an attempt to obscure the existing conflict between the Fifth and Tenth Circuits, which have directly held that subsequent procedural compliance with ESA requirements moots the claim of procedural violation, and the Ninth Circuit, which held the opposite in the instant case.

The national significance and frequency of subsequent compliance with environmental statutes is readily apparent in that a similar mootness issue is already before this Court in *Friends of the Earth v. Laidlaw Environmental Services (TOC) Inc.*, 149 F.3d 303 (4th Cir. 1998), (petition for cert. granted, No. 98-822, Mar. 1, 1999), which involves subsequent *substantive* compliance with provisions of the Clean Water Act, 33 U.S.C. § 1251, et seq., Respondents try and distinguish the mootness issue in *Laidlaw* on the grounds that in the instant case there is a continuing injury. This is irrelevant because the *Laidlaw* court did not base its decision on the lack of continuing injury: " . . . we assume without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact. (Citation omitted.)" (*Id.* at 306.) Instead, the *Laidlaw* decision was based on the court's conclusion that the only remedy available would not redress plaintiff's injury (" . . . we conclude that this action is moot because the only remedy currently available to Plaintiffs . . . would not redress any injury Plaintiffs have suffered". (*Id.* at 306-307.)) This is exactly the rationale used by the Fifth Circuit in *Glickman* ("Thus, there is no relief that can be obtained from this court." (156 F.3d at 619.)) and by the Tenth Circuit in *SUWA* ("Indeed SUWA does not explain how injunction ordering another round of consultation would provide any meaningful relief." (110 F.3d at 728.)) Although *Laidlaw*

involves a substantive violation, this Court now has before it a situation where the Fourth, Fifth and Tenth Circuits have held, in the past two years, that subsequent compliance with the provisions of an environmental statute moots a claim of violation. As noted by Professor Tarlock, the Ninth Circuit stands alone in holding that subsequent procedural compliance is meaningless in curing a procedural violation.

III.

THE ISSUE OF FACIAL PREEMPTION IS RIPE FOR REVIEW

Respondents oppose this Court's review of the conflict between the provisions of the Central Valley Project Improvement Act ("CVPIA") Pub. L. No. 102-575, 106 Stat. 4706, §§ 3401, et seq., and California Fish and Game Code Section 5937 on three grounds. First, Respondents argue that the issue is extremely narrow. (Respondents' Brief at 4.) However, Respondents' Attorney's Fees Brief, argues the opposite: "This Court's holding that the federal reclamation laws do not preempt Section 5937 of the State's Fish and Game Code also *reaffirms an important national precedent* that federal water and power projects may not ignore state laws protecting fish and wildlife." (App. at 5; emphasis added.)

Second, Respondents argue that this Court should not review the preemption issue because the lower court has not determined whether Section 5937 even applies to Friant Dam. Essentially, Respondents are arguing that the issue is not yet ripe. However, in their Attorney's Fees Brief Respondents stated that: "This Court's decision, rejecting any facial preemption argument, thus effects a clear *'material alteration' of the legal relationship between the parties,. . . .* " (App. at 7, emphasis added.) Respondents' opposition to this Court's review is wildly inconsistent with its own position before the Ninth Circuit.

Respondents go even further, setting forth the specific impacts that the Ninth Circuit's decision *has already had*:

> "This Court's decision on the preemption issue *has also had direct practical consequences.* (Citations omitted.) Before this Court's decision, the State Water Resources Control Board had announced that it would await a ruling on the preemption issue before considering the Bureau's request for licensing of Friant Dam. Candee Dec. Ex. 28. That Board also deferred certain public trust petitions, *which it now can act upon.* Candee Dec. ¶ 28. Moreover, in the wake of the District Court's earlier finding (now affirmed by this Court) that state laws such as Section 5937 could be applied to the Friant Dam, the State Board recently issued a draft EIR on implementation of the state's Bay-Delta water quality standards *which includes an alternative calling for substantial releases from Friant Dam for downstream fishery and water quality purposes, solely pursuant to state law.*" (App. at 7; emphasis added.)

Respondents' argument to this Court is even more stunning because the above-quoted conclusions are based on the declaration of Hamilton Candee, Respondents' counsel of record in this case! Mr. Candee's declaration provides strong support for Petitioners' position that this Court should review the facial preemption issue at this time.

Remarkably, despite their statement that there have already been "direct practical consequences" of the Ninth Circuit's decision, and the supporting declaration of their counsel of record, Respondents then argue that the Ninth Circuit's decision does not meet this Court's standard of reviewability because this case has not had a "direct and immediate impact". (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).) Respondents state: "The present case is clearly different [from *Abbott*] as the Court here cannot know whether Section 5937 will ever be applied

adversely to petitioners." (Respondents' Brief at 7, fn. 7.) It is hard to comprehend how "direct practical consequences" do not constitute "a direct and immediate impact." Furthermore, Respondents specifically state that Section 5937 is currently being adversely applied to Petitioners in that releases of water from Friant Dam are being considered to meet State Bay-Delta quality standards.

Finally, Respondents contend that the decision below correctly applied plain statutory language.[2] In the Petition, the conflict between the statutory language and congressional directives regarding Friant Dam was discussed at length. (Petition at 14-20.) Respondents' argument simply ignores that Congress' intent in the CVPIA was to develop a comprehensive plan that would address environmental concerns on the San Joaquin River. Respondents also ignore the plain language in the CVPIA in which Congress specifically exempted Friant Dam from responsibility for implementing that comprehensive plan.

What is truly remarkable about Respondents' argument is the notion that, although Congress expressly prohibited releases from Friant Dam in Section 3406(c) of the CVPIA, it *by implication* repealed a half century of congressional policy precluding releases from Friant Dam in order to allow the State to regulate releases under Fish and Game Code Section 5937. In fact, this Court has twice opined that it was Congress' intent to prohibit releases from Friant Dam. In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), this Court recognized that the Friant Unit was authorized by Congress with the understanding that it would impound virtually the entire flow of the San Joaquin River at Friant Dam and that a dry riverbed

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[2] At page 6, footnote 6 of Respondents' Brief, Respondents incorrectly state that Petitioners never suggest a meaning for the phrase "as a measure to implement this title." In actuality, Petitioners discuss the meaning of this phrase at page 17 of the Petition.

would exist below the dam. (*Id.* at 729-730.) Ten years after Friant operations began, this Court noted that almost three-fourths of the flow of the San Joaquin River was impaired, but declined to increase downstream flows on the grounds that to do so would force the abandonment of the project authorized by Congress and would cause the government to be "stopped in its tracks." (*Dugan v. Rank*, 372 U.S. 609, 620-621 (1963).) Contrary to this Court's decision in *California v. United States*, 438 U.S. 645 (1978), the Ninth Circuit ignored the clear congressional directives of the past half century, including those in the CVPIA, and found no facial preemption of the application of State law to Friant Dam.

In *California v. United States, supra*, this Court carefully articulated the rule governing the federal-state relationship relating to water usage. The nature of this relationship is a frequently occurring issue in water cases. The Ninth Circuit's decision threatens to disrupt the relationship defined by this Court in *California v. United States* and this Court should review this issue.

IV.

THE NINTH CIRCUIT ERRED IN RULING THAT THE BUREAU VIOLATED ITS ESA OBLIGATIONS BY ACCEPTING NMFS'S REFUSAL TO CONSULT

Respondents' Brief argues that the issue of whether the Bureau violated its ESA obligations by accepting NMFS's refusal to consult will not arise frequently. (Respondents' Brief at 7.) However, Respondents told the Ninth Circuit this issue would arise again:

> *"An additional important aspect of this Court's decision is its agreement with the district court that a federal agency has its own independent responsibility to comply with ESA procedure. See* Dunning Decl. at ¶ 9; (citation omitted). This holding will help prevent *agencies' future attempts* to justify non-compliance with the ESA by arguing that their

> actions had been somehow 'approved' by the wildlife agencies." (App. at 7; emphasis added.)

Thus, according to Respondents, this issue meets the criteria for review by this Court.

Respondents contend that NMFS did not refuse to consult with the Bureau. However, on November 1, 1991 NMFS responded to the Bureau's request for consultation: " . . . we do not believe a formal consultation on Friant contract renewals is necessary." (Petition App. at 229.) Similarly, Respondents' assertions (Respondents' Brief at 3) that Friant operations and renewal contracts were not considered in the overall consultation on Central Valley Project ("CVP") operations are simply incorrect:

> "Given that the issue of delta exports is being addressed in ongoing consultations and that the Bureau is conditioning renewed Friant contracts so they may be modified to compensate for changes in delta exports if needed, *we see no need to consult on Friant contract renewals at this time.* "However we may request initiation of the consultation process [in the future if certain criteria are met]. . . . " (Petition App. at 231; emphasis added.)

Respondents have *never* been able to explain how this was not a refusal to consult by NMFS and how the Bureau could have pursued further consultation with an agency that refused to do so. Rather than address this central problem, Respondents distort the facts regarding NMFS's consultation on overall CVP operations, which *did* occur.

Respondents state that the Bureau's 1992 consultation with NMFS "specifically excluded any consideration of either the Friant renewal contracts or the *direct* impacts of Friant Dam and operations and diversions." (Respondents' Brief at 3; emphasis added.) This is a disingenuous semantic exercise by Respondents. According to NMFS, Friant Dam *has no direct impact*: "Operations of the Friant Unit *do not directly effect winter-run chinook salmon*, and the indirect impacts of Friant operations are addressed in the discussion of the Delta Division Operations." (Petition App. at

216; emphasis added.) Thus, there were no direct impacts to consider, and the indirect impacts were being considered in the Delta Division consultation.

Respondents also state that NMFS's 1992 jeopardy biological opinion did not even consider whether to recommend changes to Friant operations or renewal contracts as part of an alternative to prevent jeopardy to the winter-run chinook salmon. (Respondents' Brief at 3, 8.) Once again, Respondents seek to mislead the Court. According to NMFS, Friant operations and contract renewal were indirectly affecting the Sacramento River winter-run salmon by requiring the export pumping of Sacramento River water from the Delta. NMFS *did* consider and consult with the Bureau on Delta export pumping in its consultation on overall CVP operations. Indeed, the comprehensive biological opinion issued by NMFS on the subject of overall CVP operations included an RPA that imposed restrictions on CVP operations, exports and take of juvenile salmon. Thus, the Bureau *did* consult with NMFS on the only identified effect of Friant contract renewal that NMFS believed was impacting the salmon and the biological opinion issued by NMFS dealt specifically with that effect.

Respondents also omit NMFS's rationale for not recommending changes to Friant operations or renewal contracts:

> " . . . the issue of delta exports is being addressed in our ongoing consultation on the CVP (see the Bureau's request for consultation on the CVP, dated April 11, 1991) and we believe this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts." (Petition App. at 230.)

As for the renewal contracts, NMFS stated:

> "We have reviewed the language the Bureau is incorporating in the renewed contracts as paragraph 14 'Compliance with reclamation Laws – Modification of Contract' and agree that to the extent it protects the Bureau from making any

> irreversible or irretrievable commitment of resources that would foreclose the Bureau's ability to develop or implement any alternatives to reduce the adverse impacts that result from delta exports, it satisfies the provisions of the Endangered Species Act on this point." (Petition App. at 231.)

NMFS's refusal to consult was a reasonable exercise of its discretion and the Bureau did not act arbitrarily in fulfilling its ESA obligations. This Court should grant certiorari to clarify the confusion created by the Ninth Circuit's decision.

V.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Dated: April 23, 1999

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, Plaintiffs/Appellees/ Cross-Appellants, v. ROGER PATTERSON, as Regional Director of the UNITED STATES BUREAU OF RECLAMATION, *et al.*, Defendants/Cross-Appellees and LOWER TULE RIVER IRRIGATION DISTRICT, *et al.* Defendants-Intervenors/ Appellants/Cross-Appellees.	Nos. 97-16030 97-16041 97-16042 97-16043 97-16044 97-16045 97-16155 97-16173 DC# CIV-S-88-16588-LKK

On Appeal from the United States District Court for the Eastern District of California

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PLAINTIFFS/APPELLEES/CROSS-APPELLANTS NATURAL RESOURCES DEFENSE COUNCIL, *ET AL.*'S BRIEF IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES, COSTS AND EXPENSES ON APPEAL

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to listed species before executing any new long-term contracts with its agricultural customers for the delivery of San Joaquin River water. *Id.* at 1126-28. In addition, this Court ruled in Plaintiffs' favor that the Government's obligation to comply with California Fish & Game Code § 5937 ("Section 5937") was a ripe issue, *id.* at 1131, and that Section 5937 was not preempted on its face by the federal reclamation laws. *Id.* at 1131-32.

Plaintiffs' victory in this Court will have a lasting effect on the preservation of endangered species in the Central Valley and San Joaquin River watershed and on the future restoration of that environment. It will also have a significant impact on future government contract renewals, requiring the government to conduct endangered species consultation and environmental review before making irrevocable commitments of the public's resources. This Court's holding that the federal reclamation laws do not preempt Section 5937 of the State's Fish

and Game Code also reaffirms an important national precedent that federal water and power projects may not ignore state laws protecting fish and wildlife.

Plaintiffs request an award under ESA of $334,357 for attorneys' fees for the work performed on appeal by Plaintiffs' counsel with respect to ESA claims. Plaintiffs also request an award under EAJA of $200,916 for work performed on appeal with

* * *

species of fish and wildlife."[19]

1. This Decision Will Aid Interpretation and Implementation of ESA.

This Court's decision aids interpretation and implementation of ESA in a number of ways. First, it establishes that compliance with ESA's procedural requirements (in this case the requirement that federal agencies obey its consultation requirements before committing public resources) is essential to preserve the substantive goals of the Act, protecting species from extinction. As this Court explained:

> Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA had not occurred. The process, which was not observed here, itself offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly

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[19] S. Rep. No. 307, 93rd Cong., 1st Sess., reprinted in 1973 U.S.C.C.A.N. 2989, 2989-30.

factored into the decision-making process as intended by Congress. 146 F.3d at 1128-1129)

This key holding forecloses future attempts by federal agencies to rationalize, on a post-hoc basis, that their prior commitment of public resources had no adverse effects on endangered species. Nor may agencies use contractual devices such as Article 14(c) "to skirt the procedural requirements" of ESA. 146 F.3d at 1128. As explained by Professor Dan Tarlock a nationwide authority on both western water law and the ESA, "[f]or the first time a court has held that the failure to respect mandated processes cannot be corrected by post hoc actions because post hoc actions preclude possible mitigation options." Tarlock Decl., ¶ 8. This Court's affirmation of ESA procedure as essential to overall compliance with the statute has application to a wide variety of government projects.

This Court's decision will also ensure future ESA compliance through its holding that the proper remedy for an ESA procedural violation is rescission of the illegally executed contract. As Professor Tarlock notes, "the contract rescission remedy is a significant remedial holding because it makes it clear that procedurally defective administrative action will not be allowed to stand." Tarlock Decl., ¶ 9. This Court's remedial holding will help ensure that agency officials and their private contractors comply with ESA procedure *before* entering into agreements that might otherwise harm endangered species.[20]

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[20] An additional important aspect of this Court's decision is its agreement with the district court that a federal agency has its own independent responsibility to comply with ESA procedure.

* * *

consistently declined to evaluate what compliance with Section 5937 might mean at Friant Dam because it has maintained that it is exempt from that statute. This Court's decision, rejecting any facial preemption argument, thus effects a clear "material alteration" of the legal relationship between the parties, thereby making the Plaintiffs "prevailing parties."

This Court's decision on the preemption issue has also had direct practical consequences. *See* Declarations of Brian Gray, Harrison Dunning, Jan Stevens and Dan Tarlock. Before this Court's decision, the State Water Resources Control Board had announced that it would await a ruling on the preemption issue before considering the Bureau's request for licensing of Friant Dam. Candee Dec. Ex. 28. That Board also deferred certain public trust petitions, which it now can act upon. Candee Dec. ¶ 28. Moreover, in the wake of the District Court's earlier finding (now affirmed by this Court) that state laws such as Section 5937 could be applied to the Friant Dam, the State Board recently issued a draft EIR on implementation of the state's Bay-Delta water quality standards which includes an alternative calling for substantial releases from Friant Dam for downstream fishery and water quality purposes, solely pursuant to state law. *Id.*

See Dunning Decl. at ¶ 9; *see* 146 F.3d at 1127 ("Bureau had affirmative duty to ensure that its actions did not jeopardize endangered species. . . . "). This holding will help prevent agencies' future attempts to justify non-compliance with the ESA by arguing that their actions had been somehow "approved" by the wildlife agencies.

This Court's rejection of the defendants' preemption arguments makes clear that these various state law based proceedings will no longer be constrained by the Government's

* * *